



FH

**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

MKB/150820

PRELIMINARY RECITALS

Pursuant to a petition filed May 20, 2013, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Disability Determination Bureau in regard to Medical Assistance, a hearing was held on August 19, 2013, at Kenosha, Wisconsin.

The issue for determination is whether the Disability Determination Bureau (DDB) correctly determined that Petitioner is no longer disabled for purposes of receiving Medicaid.

NOTE: The record was held open to allow Petitioner's mother to submit copies of recertification forms dated May 2012 and June 2013. They have been marked as Exhibits 2 and 3 respectively and entered into the record.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703

By: DDB file

Disability Determination Bureau
722 Williamson St.
Madison, WI 53703

ADMINISTRATIVE LAW JUDGE:

Mayumi M. Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a five-year-old resident of Kenosha County.

2. Petitioner has been receiving benefits through the Katie Beckett Medicaid program since December 2008, due to renal failure and hydronephrosis (swelling of the kidney due to the retention of fluid). (Testimony of Petitioner's mother; Exhibits 2 and 3)
3. Petitioner underwent a kidney transplant in September 2010. (Testimony of Petitioner's mother; DDB file)
4. Petitioner received his mother's kidney. Because he is a child with an adult kidney he requires 2 liters of fluid per day. (DDB file; testimony of Petitioner's mother)
5. Petitioner is reluctant to drink anything, so a g-tube is used to push fluids and medications, including anti-rejection medications, the dosages of which increase as the child gets older. (Id.)
6. Petitioner's condition has not changed within the last two years. (Testimony of Petitioner's mother)
7. On April 19, 2013, the DDB sent Petitioner's parents a letter indicating that he no longer meets the disability requirements for children. (DDB file)
8. Petitioner's parent filed a request for reconsideration on his behalf on May 20, 2013. (DDB file)
9. On June 25, 2013, Petitioner's mother completed a recertification form for the Katie Beckett Medicaid program. Exhibit 3)
10. On July 16, 2013, the DDB sent Petitioner's parents a letter indicating that it was upholding its original determination that Petitioner no longer met the disability requirements for children. (DDB file)
11. On July 22, 2013, the DDB forwarded Petitioner's file to the Division of Hearings and Appeals for review.

DISCUSSION

It is a well-established principle that a moving party generally has the burden of proof, especially in administrative proceedings. State v. Hanson, 295 N.W.2d 209, 98 Wis. 2d 80 (Wis. App. 1980). In other words, the party wishing to change the status quo, bears the burden of proof. In cases involving the termination of benefits, the burden falls upon the agency to show they acted correctly.

In the case at hand, the DDB determined that Petitioner was no longer disabled for purposes of receiving Katie Beckett Medicaid services, which resulted in termination of Petitioner's services. Thus, the DDB bears the burden of proof to show it acted correctly.

I. DEFINITION OF CHILDHOOD DISABILITY.

To be considered a disabled person, an applicant must meet the tests used by the Social Security Administration to determine disability for Supplemental Security Income (SSI) benefits. For SSI purposes, a disabled child must have a medically determinable physical or mental impairment, or combination of impairments, that causes marked and severe functional limitation, and that can be expected to last for at least a year. 20 C.F.R. §416.906. More specifically, 20 C.F.R. §416.911(b) declares:

If you are a child, a disabling impairment is an impairment (or combination of impairments) that causes marked and severe functional limitations. This means that the impairment or combination of impairments:

- (1) Must meet, medically equal, or functionally equal the requirements of the listings, [appendix 1 of Subpart P of 20 C.F.R., Part 404], or
- (2) Would result in a finding that you are disabled under sec. 416.994a ...

A sequential process is used to apply these definitions to a specific case. 20 C.F.R. §416.924. The first test in the sequence is whether the claimant is performing "substantial gainful activity." Because Petitioner is not working, he passes this first test.

The second sequential test is whether the claimant has an impairment or combination of impairments that is "severe." If the impairment is a slight abnormality or a combination of slight abnormalities that causes no more than minimal functional limitations, it is not severe. 20 C.F.R. §416.924(c). The Disability Determination Bureau (DDB) has conceded that Petitioner's impairment is severe, so he passes the second test.

The third sequential test element is the heart of the dispute here. The third test considers whether the child has an impairment(s) that *meets, medically equals, OR functionally equals* in severity any impairment that is listed in Appendix 1 of Subpart P of Part 404 of the regulations (Listings). 20 C.F.R. §416.924(d). The DDB determined that Petitioner did not meet this requirement, and that he is therefore not disabled for SSI/MA purposes.

II. PETITIONER'S CONDITION DOES NOT *MEET* OR *MEDICALLY EQUAL* THE LISTINGS AT SECTION 106.00.

There is a specific section in the Code of Federal Regulations that describes the symptoms a child must exhibit, in order to be found disabled for the purposes of medical assistance, Appendix 1 of Subpart P of Part 404, Part B. These are generally referred to as the Listing criteria. The criteria specific to kidney disease/transplants is found in §106.01 Category of Impairments, Genitourinary Impairments.

For a child suffering from renal disease, listing criteria are met when there are medically documented findings of:

- A. *Chronic hemodialysis or peritoneal dialysis* (see 106.00E1)
or
- B. *Kidney transplantation*. Consider under a disability for 12 months following surgery; thereafter, evaluate the residual impairments (see 106.00E2)
or
- C. *Persistent elevation of serum creatinine* to 3 mg per deciliter (dL) (100ml) or greater, over at least 3 months
or
- D. *Reduction of creatinine clearance* to 30 ml per minute (43 liters/24 hours) per 1.73 m² of body surface area over at least 3 months.

Petitioner is not on any type of dialysis, and so does not meet criteria A. Although Petitioner had a kidney transplant, it was more than 12 months ago. As such, Petitioner does not meet criteria B. Looking at the medical records in the DDB file, it does not appear that Petitioner's creatinine levels have been elevated and there is nothing in the records documentation a reduction of creatinin clearance. As such, criteria C and D are not met. Thus, it is found that Petitioner does not meet the "Listing" criteria.

The next question is whether he *functionally equals* the listing standard.

III. PETITIONER'S CONDITION DOES *FUNCTIONALLY EQUAL* THE LISTINGS.

The Listings describe impairments that are significant enough to cause "marked and severe" functional limitations. This phrase is a term of art in children's disability rules. In general, a child's impairment(s) is of "listing-level severity" if it results in "marked" limitations in two of six broad areas of functioning, or "extreme" limitations in one such area. 20 C.F.R. §416.925.

The six areas of functioning to be examined are: (1) Acquiring and using information, (2) Attending and completing tasks, (3) Interacting and relating with others, (4) Moving about and manipulating objects, (5) Caring for yourself, and (6) Health and physical well-being. 20 C.F.R. §416.926a(b)(1).

"Marked" and "extreme" limitation are defined at 20 C.F.R. 416.926a(e). Marked is defined as:

- (2) *Marked limitation*. (i) We will find that you have a "marked" limitation in a domain when your impairment(s) interferes seriously with your ability to

independently initiate, sustain, or complete activities. Your day-to-day functioning may be seriously limited when your impairment(s) limits only one activity or when the interactive and cumulative effects of your impairment(s) limit several activities. “Marked” limitation also means a limitation that is “more than moderate” but “less than extreme.” It is the equivalent of the functioning we would expect to find on standardized testing with scores that are at least two, but less than three, standard deviations below the mean.

20 C.F.R. 416.926a(e)(2)(i).

As suggested in this definition test scores are not always present and the regulations account for that:

(ii) The medical evidence may include formal testing that provides information about your development or functioning in terms of percentiles, percentages of delay, or age or grade equivalents. Standard scores (e.g., percentiles) can be converted to standard deviations. When you have such scores, we will consider them together with the information we have about your functioning to determine whether you have a “marked” or “extreme” limitation in a domain.

20 C.F.R. 416.926a(e)(1)(ii).

It is unclear from the DDB file, how it determined that Petitioner’s condition improved so dramatically, that his symptoms do not functionally equal the “Listings”.

Petitioner does exhibit marked restrictions in a number of areas. First, petitioner’s ability to care for himself is markedly limited because his ability to drink/take medication in sufficient quantities is disturbed, as demonstrated by the need for a g-tube to make sure he takes in the 2 liters of fluid to keep his adult sized kidney healthy. Indeed, it is expecting a lot of a five-year-old to consume 2 liters of liquid a day, in addition to his medications.

Second, Petitioner’s ability to participate in activities and interact with other children at school or in the community is markedly limited. According to Petitioner’s mother, Petitioner spends a great deal of time taking in fluids or urinating them out. Further, the immunosuppressant medications and his elevated risk of urinary tract infections, means that Petitioner needs to limit his activities; for example he cannot swim in open/non-chlorinated water with his friends. Petitioner must also limit participation in certain sports/physical activities, because of concerns that Petitioner will damage his transplanted kidney.

Finally, Petitioner’s health and well-being are markedly affected, because according to his mother, he is now cognizant of the fact that he cannot participate in all of the activities that his peers participate in; he is cognizant of the fact that he cannot eat and drink in the same manner as his peers, because of the g-tube and the care it requires and he is cognizant of the fact that he cannot consume the same foods and beverages as his friends, because he needs to keep his adult sized kidney healthy and functioning.

CONCLUSIONS OF LAW

1. The DDB has not met its burden to prove that Petitioner’s condition has changed or improved, such that he no longer qualifies for Medicaid Benefits.
2. The petitioner’s condition *does* functionally equal the listing criteria because the petitioner has a marked limitation in at least two domains.
3. The petitioner is disabled for Katie Beckett Medicaid purposes at this time.

THEREFORE, it is

ORDERED

That the agency reinstate Petitioner's Katie Beckett Medicaid services, if he is otherwise qualified. The agency shall take all administrative steps necessary to complete this task within ten days of this decision.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

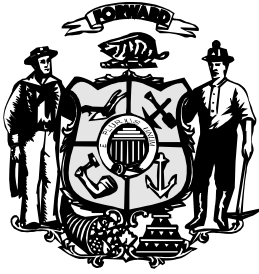
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 13th day of September, 2013.

\sMayumi M. Ishii
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on September 13, 2013.

Bureau of Long-Term Support
Division of Health Care Access and Accountability